Filed 4/3/13 (Unmodified versions of opn. and prior modification order attached)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE VEGA et al., Defendants and Appellants.	B237354 (Los Angeles County Super. Ct. No. YA076351) ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on March 7 and modified on March 12, 2013, be modified as follows:

1. The second paragraph in part I of the opinion, the introductory discussion is deleted. In its place insert:

"In the published portion of the opinion, we discuss the question of the effect of section 1170.1, subdivision (f) on the imposition of a section 12022.5, subdivision (a) firearm enhancement on David on count 1. Further, as to David, we discuss the effect of section 1170.1, subdivision (g) on the count 1 section 12022.7, subdivision (g) great bodily injury enhancement. Finally, in the published portion of our opinion, we discuss as to Jose the order *staying* a section 186.22, subdivision (b)(1)(B) gang enhancement.

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* See opinion filed March 7, 2013 for published provisions.

We affirm the judgments of conviction in their entirety. In the unpublished portions of the opinion, we modify the oral pronouncements of judgment in minor particulars. Upon remittitur issuance, as to Jose, we direct that the trial court either impose or strike the count 2 gang enhancement. As to David, the great bodily injury enhancement as to count 1 is to be imposed and then stayed."

2. On page 10, delete [Part III(B)(1) and (2)(a) through (b) is to be published] and insert in its place:

[Part III(B)(1) and (2) is to be published]

3. Add the following paragraph at the end of section (III)(B)(1):

"As discussed above, count 1, attempted voluntary manslaughter, was a violent felony because the jury sustained the section 12022.7, subdivision (a) great bodily injury allegation. (§ 667.5, subd. (c)(8).) Based on that finding, the trial court properly imposed a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). The trial court could not, however, also impose and leave unstayed the three-year great bodily injury enhancement under section 12022.7, subdivision (a). The trial court indicated imposition of the three-year great bodily injury enhancement would violate the multiple enhancement limitation in section 1170.1, subdivision (g). (*People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1331-1332; cf. *People v. Rodriguez, supra,* 47 Cal.4th at pp. 508-509.) We agree with the trial court's analysis in this regard. The trial court orally proceeded to stay the section 12022.7, subdivision (a) great bodily injury enhancement without initially imposing it. But, under California Rules of Court, rule 4.447, the trial court should have *imposed* and then stayed that enhancement. California Rules of Court, rule 4.447 expressly requires the sentencing court to *impose* the aggregate term and then *stay* execution of the prohibited sentence on an enhancement. (*People v. McQueen* (2008) 160 Cal.App.4th 27, 36-38; *People v. Walker* (2006) 139 Cal.App.4th 782, 794,

fn. 9; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1244-1245; see *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128-1129.)"

4. Delete section (III)(B)(2)(a) in its entirety.

5. Change the heading "b. stayed count 2 gang enhancement for Jose" to:

"2. Stayed count 2 gang enhancement for Jose"

6. Delete the fourth sentence in new section (III)(B)(2), "Stayed count 2 gang enhancement for Jose," which reads: "And the trial court imposed five additional years, the midterm for the gang enhancement, pursuant to section 186.22, subdivision (b)(1)(B)" and replace it with, "And the trial court imposed five additional years pursuant to section 186.22, subdivision (b)(1)(B)."

7. Change to citation to *Ahmed* in the second full paragraph of new section (III)(B)(2) from "*People v. Ahmed, supra*, 53 Cal.4th at p. 163" to "*People v. Ahmed* (2011) 53 Cal.4th 156, 163"

8. Delete section (III)(B)(2)(c) in its entirety.

9. Delete the disposition and replace it with the following:

The judgments of conviction are affirmed. The count 1 sentence as to David is modified to *impose* and then stay the three-year great bodily injury enhancement under Penal Code section 12022.7, subdivision (a). Upon remittitur issuance, as to Jose, the trial court must either impose or strike the gang enhancement on count 2 pursuant to Penal Code section 186.22, subdivision (g). As to both defendants, the oral pronouncements of judgment are modified as specified in part III(B)(b)-(c). Upon remittitur issuance and resentencing as to Jose, the superior court clerk is to prepare

amended abstracts of judgment as to both defendants. The superior court clerk is to deliver copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation. The sentences are otherwise affirmed in their entirety.

The rehearing petitions are denied.

TURNER, P.J. ARMSTRONG, J. KRIEGLER, J

Filed 3/12/13 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID VEGA et al., Defendants and Appellants.	B237354 (Los Angeles County Super. Ct. No. YA076351) MODIFICATION OF OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on March 7, 2013, be modified as follows:

On page 15, line 5, delete the following:

For count 1, Jose received the midterm of three years for attempted voluntary manslaughter plus 5 years was imposed, the midterm for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(B).

Insert in its place with the first sentence indented.

For count 1, Jose received a determinate term of eight years in state prison. The eight-year term is calculated as follows. For committing attempted voluntary manslaughter, Jose received the midterm of three years. And the trial court imposed five additional years, the midterm for the gang enhancement, pursuant to section 186.22, subdivision (b)(1)(B).

TURNER, P.J. ARMSTRONG, J. KRIEGLER, J.

Filed 3/7/13 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID VEGA et al., Defendants and Appellants.	B237354 (Los Angeles County Super. Ct. No. YA076351)

APPEALS from judgments of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Judgments of conviction affirmed; indeterminate sentences affirmed; all other sentences reversed.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant Jose Vega.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant David Vega.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, parts I, II, III(B)(1) and (2)(a)-(b) and IV are certified for publication.

I. INTRODUCTION

A jury convicted two brothers, defendants, Jose and David Vega, of two counts of attempted voluntary manslaughter (Pen. Code,[1] §§ 664, 192, subd. (a)) (counts 1 and 2). In addition, defendants were each convicted of a single count of shooting at an occupied vehicle (§ 246) (count 3). The jury found the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury further found as to David[2]: a principal was armed (§ 12022, subd. (a)(1)) (counts 1 and 2); he personally used a firearm (§ 12022.5) (counts 1 and 2); and he inflicted great bodily injury (§ 12022.7, subd. (a)) (count 1). David was sentenced to prison for a life term with a 15-year minimum term consecutive to a determinate term of 21 years, 4 months. Jose received a life term with a 15-year minimum term consecutive to a determinate term of 9 years.

In the published portion of the opinion, we discuss the question of certain stay orders which were entered. In addition, we address the effect of section 1170.1, subdivision (f) on the imposition of a firearm enhancement on David on count 1. We affirm the judgments of conviction in their entirety. We affirm the count 3 indeterminate sentences in their entirety. But we reverse the counts 1 and 2 determinate terms to permit the trial court to restructure its determinate sentencing selections.

II. THE EVIDENCE

We view the evidence in the light most favorable to the judgment. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) On October 16, 2009, at 1:40 p.m., defendants drove to disputed gang territory. They were accompanied by a fellow gang member, Gascon Veliz. Mr. Veliz's sister Erica was Jose's girlfriend. Erica Veliz and Jose had a child together.

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1 All further statutory references are to the Penal Code unless otherwise noted.

2 Because defendants have the same last name, we refer to them by their first names.

Mr. Veliz drove to the intersection of Hawthorne Boulevard and 111th Street. Defendants exited the automobile. Mr. Veliz remained in the car. He waited in a commuter parking lot across the street from a high school. Defendants attacked two rival gang members, Luis Rivera and Juan Crespo, as they walked down the street. Mr. Crespo spoke to a gang investigator. Mr. Crespo said he was attacked from behind by unknown assailants. Mr. Crespo was struck in the back of his head. The four men engaged in a fistfight. When Mr. Rivera ran, defendants chased him. Mr. Rivera fell from the sidewalk into the street. David fired a 22-caliber revolver at Mr. Rivera four times. The shots were fired while Mr. Rivera lay on the ground. One bullet hit Mr. Rivera in the leg. A second bullet struck an occupied automobile that was stopped at a traffic light. It wedged in the passenger door. Had the bullet penetrated the door, it would have struck the passenger, Vandra Hilliard, in her torso.

The two victims ran. Mr. Rivera was "hobbling" as he fled. Defendants chased the victims, then ran to Mr. Veliz's waiting car. One minute and 14 seconds after Mr. Veliz's car entered the commuter parking lot, the three gang members drove away. David threw the gun from the car while still in the parking lot. Sheriff's deputies later recovered the handgun. When Mr. Veliz's car became stuck in traffic, defendants fled on foot. They were apprehended in the vicinity of the shootings by a deputy with a dog. The victims were briefly detained. No weapons were found on their persons.

The shooting took place across the street from a high school. Students were being dismissed at the time. There were many people in the area. Students were leaving and parents were picking them up. Deputy Larry Waldie testified he saw "a crowd of kids"; "kids were just all over the corners." However, no one saw how the fistfight started. One witness, Damian Hidalgo, saw defendants, Mr. Rivera and Mr. Crespo arguing before the shooting. Mr. Hidalgo did not hear anybody shout any gang slogans.

David was 16 years old at the time of the shooting. Jose was 18. Two witnesses, Deputies Waldie and Ramon Gonzalez, identified Jose—not David—as the person who fired the shots. At trial, however, David testified he had the weapon.

Sergeant Mark Marbach testified concerning defendants' gang. Sergeant Marbach was a 20-year veteran of the sheriff's department. At the time of the present incident, he had been a gang investigator for 9 years. Sergeant Marbach explained that a reputation for violence within the community and with rival gang members is important to a gang. In order to carry out their criminal activities, gangs need to be respected and feared. When community members fear a gang, they are reluctant to report crime or to testify against gang members. If rival gang members do not fear a gang, they will challenge and disrespect the gang. They will take over the gang's territory. Moreover, the necessary fear and respect is achieved through violent acts. Committing violent crimes in broad daylight in front of witnesses is an effective way to breed fear and garner respect. When rival gangs attempt to expand their territory, when they challenge and disrespect another gang, violence results. When an individual commits a violent act, it enhances both the individual's and the gang's reputation.

Territory is also important to gangs. Gangs will try to expand their borders. They will go into a disputed area and lay claim to it. Further, gang fights often lead to shootings. Sergeant Marbach testified: "As gang members, if you're going out and seeking rivals, it's very common that someone within the group is going to be armed. If you're seeking out rival gang members, you're going into rival territory and it's reasonable to believe that those rivals will also be armed."

Sergeant Marbach was familiar with defendants' gang, which was a violent street gang. At the time of the present shootings, the gang had roughly 500 documented members. The gang's primary activities were murder, attempted murder, drive-by shootings, assaults, fistfights, stabbings, robberies, witness intimidation, weapons possession, extortion, automobile theft and drug possession and sales. The present shooting took place in a disputed area marked by rival gang graffiti. Sergeant Marbach had investigated fights involving defendants' gang that led to shootings. It was common for members of defendants' gang to confront rival gang members, to chase them down and to shoot them. Around the time of the present crimes, Sergeant Marbach had investigated a similar case involving defendants' gang. A group of gang members

became aware that rival gang members were in a particular area. They drove to that area and confronted the rival gang members. Defendants' gang exchanged slogans and challenges, then chased the rival gang members and shot one of them.

In response to hypothetical questions based on the facts of this case, Sergeant Marbach testified defendants committed the present offenses to benefit their gang. Sergeant Marbach based his opinion on the following. Defendants confronted and engaged in a violent altercation with rival gang members in broad daylight, in the presence of numerous witnesses. The incident occurred in defendants' gang's or in disputed territory. The crime had both individual and gang benefits. David used a weapon and shot a rival gang member. This bolstered David's individual status within the gang. The crime also reinforced the atmosphere of fear in the community. This fear allows the gang to carry on its illegal activities. And assaulting rival gang members bolstered the gang's reputation. It also served to claim the gang's territory.

III. DISCUSSION

[Part III(A) is deleted from publication. See post at page 10 where publication is to resume.]

A. Sufficiency Of The Evidence

1. Jose's Aiding and Abetting Liability

Jose contends there was insufficient evidence he aided and abetted David in the shooting under a natural and probable consequences theory. Jose relies on the following evidence. David had purchased a gun one week earlier. But Jose did not know David had a gun. Jose was attacked. David came to Jose's aid. David fired only warning shots. And David did not intend to shoot anyone. Jose concludes there was no evidence he

encouraged the shooting; further, the shooting was not a natural and probable consequence of the fistfight.

As our Supreme Court has explained: "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' (*People v. Prettyman* [(1996)] 14 Cal.4th [248,] 260.) Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. (*Id.* at p. 267.)" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; accord, *People v. Mejia* (2012) 211 Cal.App.4th 586, 605-606.) With respect to an aider and abettor's guilt of the intended crime, our Supreme Court has held: "'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 851, accord *People v. Perez* (2005) 35 Cal.4th 1219, 1224, fn. 3.) Under the natural and probable consequences doctrine, an aider and abettor may be guilty of any crime committed by the actual perpetrator. Guilt can result when the actual perpetrator's offense is a natural and probable consequence of the crime the accomplice intended to aid and abet. (*People v. Medina* (2009) 46 Cal.4th 913, 920; *People v. Avila* (2006) 38 Cal.4th 491, 567; *People v. McCoy, supra,* 25 Cal.4th at p. 1117.) Further, our Supreme Court has held: "The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v.*

Medina, supra, 46 Cal.4th at p. 920; accord, *People v. Zielesch* (2009) 179 Cal.App.4th 731, 739-740.) Reasonable foreseeability is a factual issue for the jury's resolution. (*People v. Medina, supra,* 46 Cal.4th at p. 920; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) Courts have repeatedly affirmed convictions where an aider and abettor participating in a fist fight was guilty of murder or attempted murder for the fatal shooting of a rival gang member. (See *People v. Medina, supra,* 46 Cal.4th at pp. 917-922]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1448-1453; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11; *People v Montes* (1999) 74 Cal.App.4th 1050, 1054-1056; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1376; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499-500 [fatal stabbing]; *People v. Montano* (1979) 96 Cal.App.3d 221, 225-227.) On appeal, we view the evidence in the light most favorable to the judgment to determine whether there is substantial evidence of Jose's guilt. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322; *People v. Snow* (2003) 30 Cal.4th 43, 66.)

There was substantial evidence Jose aided and abetted the shooting of Mr. Rivera by David. Defendants were brothers. They were both members of a street gang that regularly committed violent crimes. David, who was 16 at the time, had been a member of the gang for more than a year. The gang relied on violent acts as a means to gain respect individually and for the gang, as well as to instill fear in the community. David testified that defendants left home together on the day of the shooting. They briefly went their separate ways. David retrieved a gun he had hidden on his aunt's property. Jose returned to pick David up together with their fellow gang member, Mr. Veliz. The three men drove to an area in dispute among rival gangs, including the victims' gang. The commuter parking lot where Mr. Veliz parked his car was marked with gang graffiti from multiple gangs, including that of the victims. Defendants argued with and assaulted two rival gang members. Defendants knowingly and intentionally participated in the fistfight. David took a 22-caliber revolver from his pocket. David fired directly at Mr. Rivera. David fired at Mr. Rivera when he was on the ground. David chased Mr. Rivera into the street. Jose was at David's side as they ran. They fled together, disposing of the gun in the process. They were together when law enforcement officers detained them.

Eyewitnesses testified the entire incident occurred very quickly. The assault and the shooting were closely connected. Detective Marbach testified it was common for gang members generally and for defendants' gang specifically to shoot rival gang members during or in the aftermath of a fistfight. This was sufficient evidence for a reasonable trier of fact to conclude Jose aided and abetted his brother in the shooting.

As noted, Jose denied knowing David had a gun. The jury was free to disbelieve Jose's testimony. And in any event, as our Supreme Court has held, "[P]rior knowledge that a fellow gang member is armed is not necessary to support a defendant's . . . conviction as an aider and abettor." (*People v. Medina, supra,* 46 Cal.4th at p. 921, citing *People v. Montes, supra,* 74 Cal.App.4th at p. 1056, *People v. Godinez, supra,* 2 Cal.App.4th at p. 501, fn. 5, and *People v. Montano, supra,* 96 Cal.App.3d at p. 227.) As the Court of Appeal noted in *People v. Montes, supra,* 74 Cal.App.4th at page 1056: "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gun fire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them. Given the great potential for escalating violence during gang confrontations, it is immaterial whether [the defendant] specifically knew [the shooter] had a gun." (Cited with approval in *People v. Medina, supra,* 46 Cal.4th at p. 926; see also *People v. Godinez, supra,* 2 Cal.App.4th at p. 500 ["[It is] common knowledge that an unfortunate reality of modern times is that gang confrontations all too often result in death . . . ."].) In the context of gang culture, the jury could reasonably conclude the shooting was a natural and probable consequence of the planned assault on and fistfight with rival gang members. And the jurors could intelligently conclude Jose knew or should have known the shooting was a reasonably foreseeable consequences of the aided and abetted act. The argument there is not substantial evidence to support a natural and probable consequence theory of culpability is frivolous in this context.

2. The gang enhancement

Defendants further assert there was insufficient evidence to support the gang enhancement. They concede the evidence that each of the four individuals involved in the altercation belonged to or was affiliated with a gang. They reason, however, as follows. There was no evidence any individual called out a gang slogan or name. There was no evidence of any gang-related behavior. There was no evidence either defendant displayed visible gang tattoos, was dressed in typical gang attire, or was wearing gang "colors." Neither victim testified the fight had anything to do with gang membership.

Our review is for substantial evidence. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) Substantial evidence supported the section 186.22, subdivision (b)(1) finding. As noted above, Sergeant Marbach was a 20-year veteran of the sheriff's department. At the time of the present incident, he had been a gang investigator for 9 years. Defendants were members of a violent gang. Sergeant Marbach was familiar with the gang. Sergeant Marbach testified in response to a hypothetical question tracking the facts of the present case that the crime was committed for the benefit of the gang. Sergeant Marbach reasoned as follows. Defendants confronted and engaged in a violent altercation with rival gang members in broad daylight, in the presence of numerous witnesses. The incident occurred in defendants' gang's or disputed territory. The crime had both individual and gang benefits. That David used a weapon and shot a rival gang member bolstered his individual status within the gang. The crime also reinforced the atmosphere of fear in the community. This fear allows the gang to carry on its illegal activities. And assaulting rival gang members bolstered the gang's reputation. It also served to claim the gang's territory. This was sufficient evidence to support the gang enhancement finding. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-324; *People v. Albillar*, *supra*, 51 Cal.4th at p. 63; *People v. Hunt* (2011) 196 Cal.App.4th 811, 821; *People v. Miranda* (2011) 192 Cal.App.4th 398, 412-413.)

[Part III(B)(1) and (2)(a) through (b) is to be published]

B. Sentencing

1. David's Count 1--sentences for both the gang and firearm use enhancements

As to David, count 1, attempted voluntary manslaughter, was enhanced under both sections 186.22, subdivision (b)(1)(C) for promoting gang activity and 12022.5, subdivision (a) for firearm use. David argues the trial court erroneously imposed both the 10-year gang and the 4-year firearm use enhancements. We respectfully disagree.

As noted, as to count 1, David was convicted of attempted voluntary manslaughter. Additionally, the jury found three relevant special allegations to be true: he personally used a firearm; the offense was committed for the benefit of a street gang; and he personally inflicted great bodily injury. The trial court imposed the midterm of 4 years for firearm use. In addition, the trial court imposed 10 years for the gang enhancement. Finally, as we will note, the trial court stayed the sentence for great bodily injury.

Count 1 is a violent felony because the firearm use and great bodily injury allegations were found to be true. (§ 667.5, subd. (c)(8) ["Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 . . . or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of . . . Section 12022.5 . . . ."]; *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1090 [great bodily injury finding renders offense a violent felony]; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1025 [firearm use].) Count 1 is a violent felony for two reasons. To begin with, the firearm use allegation was found to be true. And, the jury sustained the great bodily injury allegation.

Having identified the violent nature of the offense, we now turn to the possible gang enhancements. Section 186.22, subdivision (b)(1) specifies three enhancements

which may be imposed in addition to the sentence for the offense: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." It is this latter section 186.22, subdivision (B)(1)(C) 10-year gang enhancement that is at issue because the attempted voluntary manslaughter conviction is a violent felony.

For his contention that the trial court erroneously imposed both the 4-year firearm use and 10-year gang enhancements, David relies upon section 1170.1, subdivision (f) which states: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." David also relies upon the following analysis concerning section 1170.1, subdivision (f) in *People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509, where our Supreme Court held: "At issue here are the additional punishments that the trial court imposed, with respect to defendant's assaults on victims Miguel and Jose, under two different sentence enhancement provisions: section 12022.5's subdivision (a), and section 186.22's subdivision (b)(1)(C). These additional punishments comprised a total of 18 years and eight months—defendant's total prison sentence was 22 years and eight months. [Citation.] [¶] There is no question that the additional punishments imposed under

section 12022.5's subdivision (a) for 'personally us[ing] a firearm in the commission of a felony,' fall squarely within the limiting language of section 1170.1's subdivision (f). This is why: The additional punishments totaling five years and four months imposed under section 12022.5's subdivision (a) for defendant's personal use of a firearm in each of the three assaults were, in the words of section 1170.1's subdivision (f), punishments 'for . . . using . . . a firearm in the commission of a single offense.' The additional punishments totaling 13 years and four months under section 186.22's subdivision (b)(1)(C), the criminal street gang provision, were likewise based on defendant's firearm use. Because two different sentence enhancements were imposed for defendant's firearm use in each crime, section 1170.1's subdivision (f) requires that 'only the greatest of those enhancements' be imposed." (Accord, *People v. Morgan* (2011) 194 Cal.App.4th 79, 84 ["Briefly, in *Rodriguez,* our high court held that the trial court should not have imposed sentence enhancements both for the defendant's personal firearm use (§ 12022.5, subd. (a)) and for committing a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)), because both sentence enhancements relied on the defendant's firearm use and section 1170.1, subdivision (f) required that only the greatest of the enhancements could be imposed."]; *People v. Martinez* (2012) 208 Cal.App.4th 197, 199-200.)

However, the analysis in *Rodriguez* is inapplicable. In *Rodriguez,* the jury had not returned a great bodily injury finding. Rather, in *Rodriguez,* the multiple sentencing issue arose because the jury found both the firearm use and section 186.22, subdivision (b)(1)(C) gang allegations to be true. And, the only reason the aggravated assault was a violent felony and, hence subject to the 10-year gang enhancement, was because the firearm use finding was sustained. Here, even if no firearm use finding had been returned, the attempted voluntary manslaughter offense would still be a violent felony thereby triggering the 10-year gang enhancement. And why--because the great bodily injury finding made the attempted voluntary manslaughter offense into a violent felony. (§ 667.5, subd. (c)(8); *People v. Ruiz, supra,* 69 Cal.App.4th at p. 1090.) In *Rodriguez,* our Supreme Court emphasized the *sole* reason the defendant became eligible for the 10-year enhancement for participating in a gang was because he used a firearm, "Here,

defendant became eligible for this 10-year punishment *only* because he 'use[d] a firearm which use [was] charged and proved as provided in . . . 12022.5.'" (*People v. Rodriguez*, *supra*, 47 Cal.4th at p. 509 (original italics); see *People v. Robinson* (2012) 208 Cal.App.4th 232, 257.) Thus, given the great bodily injury finding, nothing in section 1170.1, subdivision (f) or *Rodriguez* prevented the trial court from imposing both the firearm use and gang enhancements.

2. Stay orders

a. count 1--great bodily injury as to David

David was convicted in count 1 of attempted voluntary manslaughter. In addition, the jury found four special allegations to be true: he personally used a firearm (§ 12022.5); a principal in the commission of the offense was armed with a firearm (§ 12022, subd. (a)(1)); he personally inflicted great bodily injury (§ 12022.7, subd. (a)); and the offense was committed for the benefit of a street gang. (§ 186.22, subd. (b)(1).) David was sentenced on count 1 as follows: the mid-term of 3 years for attempted voluntary manslaughter; 10 years for the gang enhancement; and the mid-term of 4 years for firearm use. The trial court orally stayed the count 1 section 12022.7, subdivision (a) great bodily injury enhancement. The trial court did not purport to dismiss the count 1 great bodily injury enhancement pursuant to section 1385, subdivision (a).

A trial court must impose sentence in accord with law. (§ 12; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588-1589) A trial court possesses no independent jurisdiction to stay a sentence. (*People v. Baylor* (1989) 207 Cal.App.3d 232, 236; *People v. Floyd P.* (1988) 198 Cal.App.3d 608, 612.) A trial court does have the authority to stay the execution of a sentence under specified legal circumstances: section 654, subsection (a) (section 654) to avoid impermissible double punishment; to comply with limitations on imposition of multiple enhancements (§ 1170.1, subds. (f)-(g), Cal. Rules of Court, rule 4.447); and to grant probation. (§ 1203, subds. (a), (k).) Absent

these statutory or rule-promulgated delineated grounds, a trial court has no generalized jurisdiction to stay a portion of a sentence. (*People v. Woods* (2010) 191 Cal.App.4th 269, 271-274 [absence of authority to stay mandatory fines]; *People v. Baylor*, *supra*, 207 Cal.App.3d at p. 236 [no independent authority to stay sentence on three counts pursuant to a plea bargain].) An improper stay is a legally unauthorized sentence. (*People v. Oates* (2004) 32 Cal.4th 1048, 1068-1069; *People v. Cattaneo*, *supra,* 217 Cal.App.3d at pp. 1588-1589.)

Our Supreme Court has held that section 1170.1, subdivisions (f) and (g)[3] permitted imposition of multiple firearm use and great bodily injury enhancements under these circumstances. (*People v. Ahmed* (2011) 53 Cal.4th 156, 168 ["The history of the amendments of section 1170.1 leading to its current subdivisions (f) and (g), as well as the committee reports on Senate Bill No. 721, make clear the Legislature that enacted those subdivisions intended to permit the sentencing court to impose both one weapon enhancement and one great-bodily-enhancement for *all* crimes."].) Further, the great bodily injury enhancement is mandatory. (§ 12022.7, subd. (a); *People v. Beltran* (2000) 82 Cal.App.4th 693, 696; *People v. Johnson* (1980) 104 Cal.App.3d 598, 611-612.) Thus, the stay of the count 1 great bodily injury enhancement must be reversed. However, once the remittitur issues, the trial court remains free to strike the count 1 great bodily injury enhancement pursuant to section 1385, subdivision (a). (See *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364.)

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3 Section 1170.1, subdivisions (f) and (g) state: "(f) When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury. [¶] (g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm."

If the trial court elects to strike the great bodily injury finding, it must set forth its reasons in the clerk's minutes. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.)

b. stayed count 2 gang enhancement for Jose

For count 1, Jose received the midterm of 3 years for attempted voluntary manslaughter plus 5 years was imposed, the midterm for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(B). (David's gang enhancement was greater because he was convicted of a violent felony by reason of his personal firearm use or inflicting great bodily injury.) As to count 2, the trial court imposed one-third the midterm of one year for attempted voluntary manslaughter. However, as to count 2, the trial court orally stayed one third the midterm for the gang enhancement. The trial court did not purport to utilize its powers to strike the additional term for the gang enhancement as permitted by section 186.22, subdivision (g), which we will discuss shortly.

As to count 2, the trial court did not have the authority to stay Jose's gang enhancement. First, we look to the language of section 186.22 to determine whether the enhancement should have been imposed; i.e. it was mandatory subject to being stricken. (*People v. Ahmed, supra,* 53 Cal.4th at p. 163; see *People v. Robinson, supra,* Cal.App.4th at pp. 259-261.) As noted, the language of section 186.22, subdivision (b)(1) is mandatory, "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the . . . attempted felony of which he or she has been convicted, be punished as follows. . . ." The statutory language is clear--absent a lawful reason not to do so (which we will discuss momentarily), the gang enhancement must be imposed. Second, the count 2 substantive offense, attempted voluntary

manslaughter, is not subject to section 654. Attempted voluntary manslaughter is a crime of violence for section 654 purposes because it was directed at separate victims, Mr. Rivera and Mr. Crespo. (*People v. Champion* (1995) 9 Cal.4th 879, 934-935, disapproved on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860 [acts of violence against separate victims may be separately punished]; *People v. Price* [(1991)] 1 Cal.4th 324, 492 [same]); *People v. Perez* (1979) 23 Cal.3d 545, 553.) Thus, the gang enhancement is also not subject to section 654. (*People v. Akins* (1997) 56 Cal.App.4th 331, 340.) This analysis is consistent with the legislative intent expressed in section 186.22—to eradicate gang criminal activity by enhancing penalties therefore. (*People v. Gardeley* (1996) 14 Cal.4th 605, 609; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1227.) Thus, Jose's count 2 gang enhancement may not be stayed.

Upon remittitur issuance, the trial court retains the authority to strike Jose's count 2 gang enhancement pursuant to section 186.22, subdivision (g) which states, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." As in connection with a determination to strike an enhancement pursuant to section 1385, subdivision (a), the minutes must state the circumstances justifying striking the additional term of imprisonment. Thus, upon remittitur issuance, the trial court must either impose or strike the gang enhancement pursuant section 186.22, subdivision (g).

[The remainder of part III is deleted from publication. See post at page 19 where publication is to resume.]

c. remand

We are reversing all of the determinate sentences. This will permit the trial court to structure the determinate sentences once the remittitur issues. (*People v. Rodriguez, supra,* 47 Cal.4th at pp. 508-509; *People v. Martinez, supra,* 208 Cal.App.4th at pp. 199-200.) We have affirmed the count 3 indeterminate sentences. No action need be taken on count 3 as to both defendants.

3. Consecutive versus concurrent sentencing

David argues the trial court abused its discretion in imposing a consecutive sentence on count 2 because it failed to state its reasons for doing so. David forfeited this argument by failing to object in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 355; *People v. Morales* (2008) 168 Cal.App.4th 1075, 1084; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117-1124.) David had a meaningful opportunity to object. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 752; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.) Even if the issue were properly before us, we would not find it reasonably probable a more favorable sentence would have been imposed. (*People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. Avalos* (1984) 37 Cal.3d 216, 233.) David, armed with a firearm, shot at rival gang members. The shooting took place in the vicinity of a school. An occupied automobile was hit.

Additionally, his prior delinquent conduct is extensive and of increasing seriousness. David, a juvenile, repeatedly had committed crimes from 2006 through 2008. In January 2006, he was arrested for burglary and taking a vehicle without permission. In July 2006, he was arrested for second degree robbery, first degree burglary, and participating in a criminal street gang. In September 2006, he was arrested for conspiracy to commit an unspecified crime. In March 2007, he was arrested for robbery. In April 2007, David was arrested for conspiracy to commit a crime. In September 2007, David was arrested for obstructing or resisting a peace officer and

failing to comply with a juvenile court order. The delinquency petition arising from his arrest was sustained. In November 2007, David was arrested for carrying a concealed weapon and participating in a criminal street gang. As a result, David was committed to the camp community placement program. In June 2008, David was arrested for obstructing or resisting a peace officer. In the present case, David, who was armed, shot a rival gang member and inflicted great bodily injury. Had the second bullet not lodged in the car door, a second person might have been killed or seriously injured. David testified he had been a gang member for about a year and a half prior to the shootings in this case. He was 16 years old at the time of the shooting. Given the foregoing circumstances, it is not reasonably probable the trial court would have imposed a concurrent sentence on count 2.

4. The gang findings resulting in indeterminate sentences

In count 3, defendants were convicted of shooting at an occupied motor vehicle in violation of section 246. In addition, the jury found the gang allegation to be true. As to count 3, David received an indeterminate term of 15 years to life.

David argues the trial court had discretion pursuant to section 1385, subdivision (a) to strike the gang enhancement. Section 186.22, subdivision (g), which we have discussed in the published portion of this opinion, grants a trial court discretion to strike a gang enhancement. However, the gang finding as to count 3 resulted in an indeterminate sentence, not a separate fixed determinate sentence. The trial court properly concluded it had no such discretion. (*People v. Campos* (2011) 196 Cal.App.4th 438, 450-454.)

5. Court operations assessments

The trial court imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)) on each defendant. The trial court should have orally imposed the $40 assessment as to *each count* for a total of $120. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483-484;

People v. Schoeb (2005) 132 Cal.App.4th 861, 865-866; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) The oral pronouncement of judgment must be modified to so provide.

6. Court facilities assessments

The trial court imposed a $30 "new conviction fund fee" on each defendant. The trial court should have orally imposed a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) as to each count for a total of $90. (*People v. Sencion, supra,* 211 Cal.App.4th at pp. 483-484; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) The oral pronouncement of judgment must be modified to so provide.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The judgments of conviction are affirmed. The count 3 sentences are affirmed. All determinate sentences for offenses and enhancements in counts 1 and 2 are reversed. Upon remittitur issuance, the trial court is to resentence defendants in accord with part III(B) of this opinion. Upon remittitur issuance and resentencing, the superior court clerk is to prepare amended abstracts of judgment and deliver copies to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.